

information about the identities of the individuals associated with the customer when standard documentary or non-documentary verification methods prove to be insufficient.

The final rule, therefore, includes a new provision requiring that the CIP address situations in which, based on the FCM's or IB's risk assessment of a new account opened by a customer that is not an individual, the firm also will obtain information about individuals with authority or control over the account (e.g., persons authorized to effect transactions in the account) in order to verify the customer's identity. This additional verification method applies only when the FCM or IB cannot adequately verify the customer's identity after using the documentary and non-documentary verification methods described above.⁶⁸

Section 103.123(b)(2)(iii) Lack of Verification

Treasury and the CFTC proposed to require that an FCM's or IB's CIP include procedures for responding to circumstances in which the firm cannot form a reasonable belief that it knows the true identity of the customer.⁶⁹ Treasury and the CFTC explained in the NPRM that the CIP should specify the actions to be taken, which could include closing the account or placing limitations on additional trading.⁷⁰ Treasury and the CFTC also explained that there should be guidelines for when an account will not be opened (e.g., when the required information is not provided), and that the CIP should address the terms under which a customer may conduct transactions while the customer's identity is being verified.⁷¹

There were no comments on this aspect of the proposed rule, and Treasury and the CFTC have adopted the provision substantially as proposed. The final rule, however, adds a description of the recommended features of these procedures, similar to the features that were described in the NPRM. Thus, the final rule provides that the CIP's procedures should describe: (1) When an account should not be opened; (2) the terms under which a customer may conduct transactions while the FCM or IB attempts to verify the customer's identity; (3) when the FCM or IB should

file a suspicious activity report (SAR) in accordance with applicable law and regulation;⁷² and (4) when an account should be closed, after attempts to verify a customer's identity have failed.

Section 103.123(b)(3) Recordkeeping

Section 103.123(b)(3)(i) Required Records. Treasury and the CFTC proposed to require that CIPs of FCMs and IBs include certain recordkeeping procedures.⁷³⁻⁷⁴ First, the proposed rule would have required that an FCM or IB maintain a record of the identifying information provided by customers. Second, if an FCM or IB relied on a document to verify a customer's identity, the proposed rule would have required the firm to maintain a copy of the document. Third, the proposed rule would have required FCMs and IBs to record the methods and results of any additional measures undertaken to verify the identity of customers. Finally, the proposed rule would have required FCMs and IBs to record the resolution of any discrepancy in the identifying information obtained.

Although there were no comments on this aspect of the proposed rule, Treasury and the CFTC have reconsidered and modified the recordkeeping requirements of the rule based on comments received with respect to the parallel recordkeeping provisions in the proposed CIP rules jointly issued by Treasury and the other Federal functional regulators. The final rule provides that an FCM's or IB's CIP must include procedures for making and maintaining records related to verifying the identities of customers. However, the final rule is more flexible than the proposed rule in this regard.

Under the final rule, FCMs and IBs still must make a record of all identifying information obtained about each customer. However, rather than requiring that copies of verification documents be maintained, the final rule requires that an FCM's or IB's records include a description of any document that the firm relied on to verify the identity of the customer, noting the type of document, any identification number contained in the document, the place of issuance, and the issuance and expiration dates, if any. With respect to non-documentary verification, the final rule requires the records to include a description of the non-documentary methods and the results of any additional measures undertaken to verify the identity of the customer. The

final rule also requires a description of the resolution of any "substantive discrepancy" discovered when verifying the identifying information obtained. This is intended to make clear that a record would not have to be made in the case of a minor discrepancy, such as one that might be caused by typographical mistakes.

Section 103.123(b)(3)(ii) Record Retention

Treasury and the CFTC proposed to require that an FCM or IB retain all required records for five years after the account is closed.⁷⁵ Although there were no comments on this aspect of the proposed rule, commenters on the other Federal functional regulators' proposed CIP rules expressed concern regarding this requirement as costly and overly burdensome, particularly with respect to the length of time that certain records would need to be retained and the requirement that financial institutions retain copies of the documents used to verify customer identities. The final rules adopted by Treasury and the Federal functional regulators address many of these concerns.

Treasury and the Federal functional regulators have, in the final rules, eliminated the requirement that a financial institution retain copies of documents used to verify customer identities. Treasury and the Federal functional regulators also believe that, while the identifying information provided by customers should be retained as proposed, there is little value in requiring financial institutions to retain the remaining records for five years after an account is closed, because this information is likely to grow stale. Therefore, the final rule prescribes a bifurcated record retention schedule that is consistent with a general five-year retention requirement.

Under the final rule, an FCM or IB must retain the information obtained about a customer pursuant to paragraph (b)(3)(i)(A) (i.e., all minimum identifying information obtained under (b)(2)(ii)(A)) for five years after the date the account is closed.⁷⁶ The remaining records required under paragraphs (b)(3)(i)(B), (C), and (D) (i.e., descriptions of: any document relied upon to verify identity; methods and results of any measure taken to verify identity; and the resolution of each substantive discrepancy discovered

⁶⁸ An FCM or IB need not undertake any additional verification if it chooses not to open an account when it cannot verify the customer's identity after using standard documentary and non-documentary verification methods.

⁶⁹ See NPRM, 67 FR at 48338.

⁷⁰ See NPRM, 67 FR at 48334.

⁷¹ *Id.*

⁷² FinCEN has not yet published a rule requiring FCMs and IBs to report suspicious activities. These firms may, however, voluntarily file SARs with FinCEN to report suspicious activities.

⁷³⁻⁷⁴ See NPRM, 67 FR at 48338.

⁷⁵ See NPRM, 67 FR at 48338.

⁷⁶ The Secretary has determined that the records required to be retained under section 326 of the Act have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, to protect against international terrorism.